

WEBINAR WEDNESDAYS



Wednesday, February 17, 2021

Addressing Sexual & Domestic Violence: A Brief Introduction to Victim Privacy

Presented by:


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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR



Webinar Wednesday

Introduction to Victim Privacy

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1



2



I Love it When a Plan Comes Together

- Why do we care?
- Privacy, Confidentiality, and Admissibility
- Medical Records
- Mental Health Records
- VAWA Protections

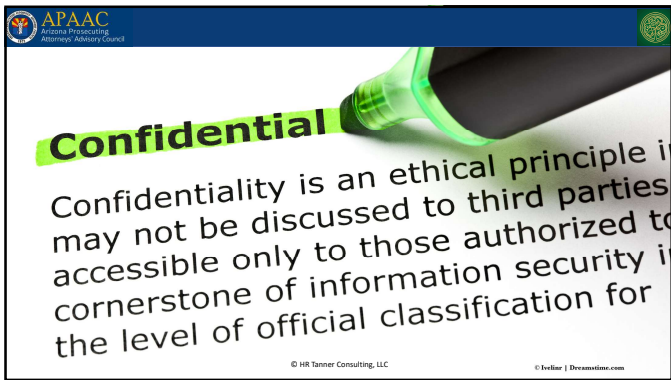


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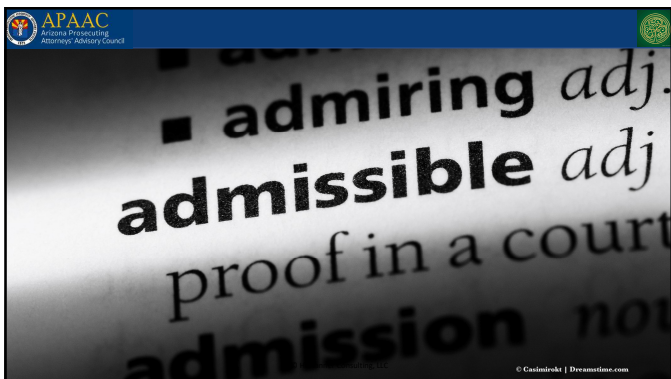
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Arizona Prosecuting Attorneys' Advisory Council

Origin in the Arizona Constitution

To preserve and protect victims' rights to justice and due process, a victim of crime has a right:


1. To be treated with **fairness, respect, and dignity**, and to be **free from intimidation, harassment, or abuse**, throughout the criminal justice process.

Ariz. Const. art. II § 2.1(A) - Victims' Bill of Rights



Bill of rights

10




Arizona Prosecuting Attorneys' Advisory Council

Origin in the Arizona Constitution

To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

5. To **refuse** an interview, deposition, or other **discovery request by the defendant**, the defendant's attorney, or other person acting on behalf of the defendant.

Ariz. Const. art. II § 2.1(A) - Victims' Bill of Rights



Bill of rights

11




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Balancing the Due Process Rights




12




Arizona Tosses the Ball to HIPAA

- Records are “privileged and confidential” and can disclosed by state or federal law or written authorization. A.R.S. § 12-2292
- Disclosure is allowed without authorization if by court order or as authorized by state or federal including HIPAA privacy standards. A.R.S. § 12-2294(C)
- A subpoena for medical records must be accompanied by “order that requires release...or that meets the requirements for a qualified protective order” under HIPAA. A.R.S. § 12-2294.01(B)(2)

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13




If you catch that ball, remember that the more restrictive law will govern what the covered entity does, and usually that will be HIPAA

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What's a HIPAA, Anyway?


HHealth
Insurance
Portability and
Accountability
Act

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15




What's a HIPAA, Anyway?



- Insure employees could take health insurance with them
- Improve efficiency and effectiveness of electronic health care transactions
- Address the privacy of electronic medical records

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16



The Code of Federal Regulations

HIPAA Administrative Simplification Rules

Title 45. Public Welfare

Subtitle A. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Subchapter C. ADMINISTRATIVE DATA STANDARDS AND RELATED REQUIREMENTS


Part 164. SECURITY AND PRIVACY

Subpart E. PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION

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Rules changes have been submitted for comment – some things may change

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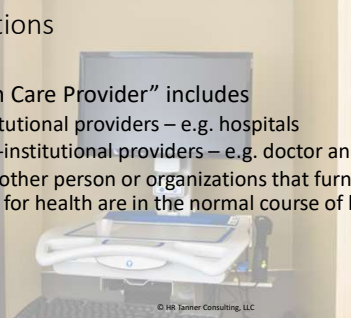
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Definitions

“Health Care Provider” includes

- Institutional providers – e.g. hospitals
- Non-institutional providers – e.g. doctor and dentist
- Any other person or organizations that furnishes, bills, or is paid for health care in the normal course of business



History & Exam

Nurse

Nurse Assistant

Doctor


Goal & Plan for the Day

Discharge Date

WISCONSIN
WISDOM SERVICES

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19




Definitions

“Covered entities” are

- Health Plans
- Health Care Clearinghouses, and
- Health Care Providers

that transmit health information in electronic form



History & Exam

Nurse

Nurse Assistant

Doctor

Goal & Plan for the Day

Discharge Date

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Patient Rights and Obligations



History & Exam

Nurse

Nurse Assistant

Doctor

Goal & Plan for the Day

Anticipated Discharge Date

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Patient Rights in HIPAA

- Notice of Privacy Practices
- Inspect and Copy
- An account of to whom your PHI is given
- Restrict placing your information in the patient directory
- Complain about the use or alleged misuse of PHI

Nurse
 Nurse Assistant
 Doctor
 Goal & Plan for the Day
 Anticipated Discharge Date

22

Provider Obligations in HIPAA


- Train employees on the privacy rules
- Establish a privacy officer
- Establish a process for communicating patient rights
- Log disclosures
- Prevent inadvertent disclosures
- Protect against "incidental" disclosure

Nurse
 Nurse Assistant
 Doctor
 Goal & Plan for the Day
 Anticipated Discharge Date
 UNDISCLOSED
 NOCTURNAL SERVICE

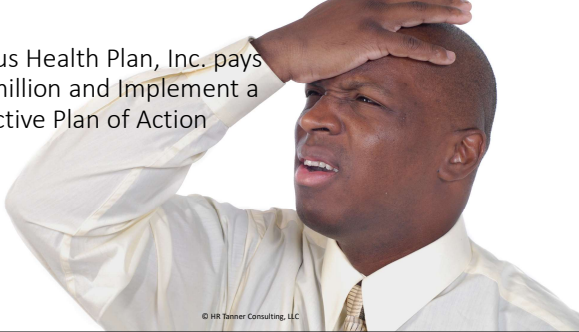
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Do Hospitals and Docs Really Care?

24



Excellus Health Plan, Inc. pays \$5.1 million and Implement a Corrective Plan of Action



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Right of Access initiative resulted in multiple fines against other covered entities



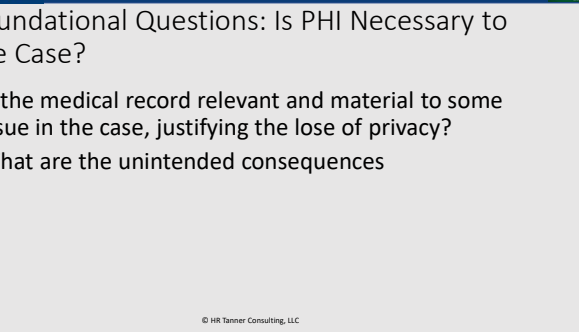
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Foundational Questions: Is PHI Necessary to the Case?

- Is the medical record relevant and material to some issue in the case, justifying the lose of privacy?
- What are the unintended consequences




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How Do We Get PHI?

- Protected in both federal and Arizona Law
- Authorizations for the release of PHI
- Release without authorization in limited circumstances

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The Queen of Process




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29



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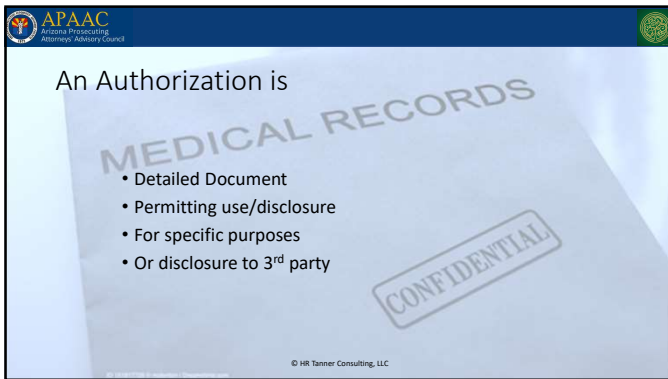


What Is an Authorization for Release?

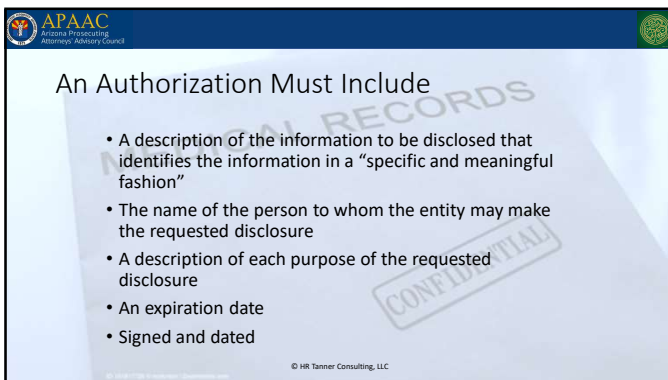
The document by which a patient gives consent to shared PHI with a 3rd Party

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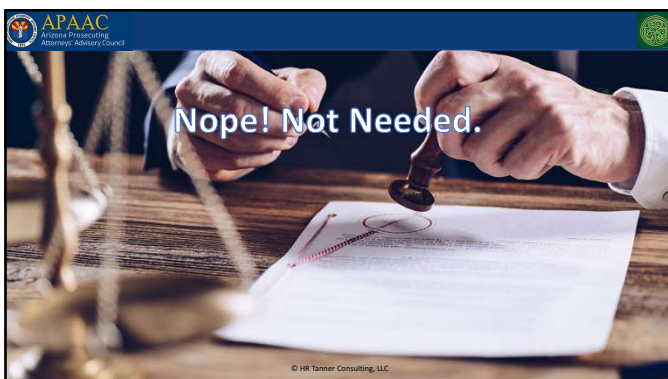
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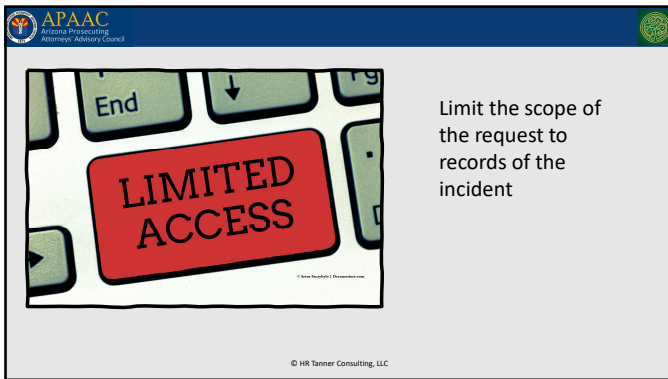
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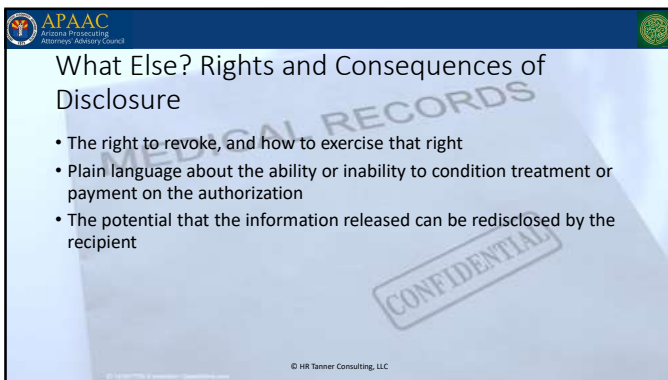
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33




34



35



36



TIME FOR REVIEW

This information is to be used for the following purpose(s) only: LAW ENFORCEMENT

The specific information to be released/disclosed is specified below: ☐ Complete Medical Record

<input type="checkbox"/> Inpatient/Outpt Surgery Date(s): _____ <input type="checkbox"/> Discharge Summary <input type="checkbox"/> History and Physical <input type="checkbox"/> Operative Report <input type="checkbox"/> Pathology Report <input type="checkbox"/> Progress Notes <input type="checkbox"/> Orders <input type="checkbox"/> Laboratory <input type="checkbox"/> X-rays <input type="checkbox"/> Pertinent Record Set	<input type="checkbox"/> Emergency Dept. Date(s): _____ <input type="checkbox"/> ER Report <input type="checkbox"/> Complete Record <input type="checkbox"/> Billing Records <input type="checkbox"/> Claim Form <input type="checkbox"/> Detailed Bill <input type="checkbox"/> Other Outpatient Dept.	<input type="checkbox"/> Outpatient Diag. Tests Test _____ Date _____ <input type="checkbox"/> Laboratory <input type="checkbox"/> X-rays <input type="checkbox"/> CT Scans <input type="checkbox"/> Nuclear Med <input type="checkbox"/> EEG <input type="checkbox"/> EKG <input type="checkbox"/> Vascular Study <input type="checkbox"/> Sleep Study <input type="checkbox"/> Echocardiogram <input type="checkbox"/> Pulmonary Test <input type="checkbox"/> Other	<input type="checkbox"/> Cancer Treatment Ctr. Date(s): _____ <input type="checkbox"/> Discharge Summary <input type="checkbox"/> History and Physical <input type="checkbox"/> Treatment Summary <input type="checkbox"/> Laboratory Reports <input type="checkbox"/> Follow-up Reports <input type="checkbox"/> Consultations <input type="checkbox"/> Progress Notes <input type="checkbox"/> X-rays/CT/Nuclear Med <input type="checkbox"/> EKG
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37



TIME FOR REVIEW

I understand that the information described above may be re-disclosed in which case it is no longer protected by patient privacy regulations.

I understand that I may refuse to sign this authorization and that my refusal to sign will not affect my consent to the use or disclosure of my protected health information for purposes of treatment, payment or health care operation's, nor is my treatment or payment for treatment conditional on my signing this authorization.

I understand that I may revoke this authorization in writing at any time at the address found below, except to the extent that information has already been released and/or used in response to this authorization, or an authorization, otherwise received by _____ Unless otherwise revoked, this authorization will expire on the following date or event: _____ If I fail to specify an expiration date/event, this authorization will expire in twenty-four (24) months.

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38



TIME FOR REVIEW

SPECIFIC AUTHORIZATION

I understand that my health information to be released MAY INCLUDE information that is related to sexually transmitted disease, acquired immunodeficiency syndrome (AIDS), or human immunodeficiency virus (HIV), behavioral or mental health services, and/or treatment for alcohol and/or drug abuse. My signature below authorizes release of all such information, unless I have crossed it out, and initialed it. _____Initials

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Overly broad disclosures can invade victim privacy AND introduce irrelevant issues



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40

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Disclosure Without Authorization to Release

- Disclosures requiring an opportunity for the patient to object
- Disclosures for which no opportunity to object is required
 - Law enforcement initiated
 - Provider initiated

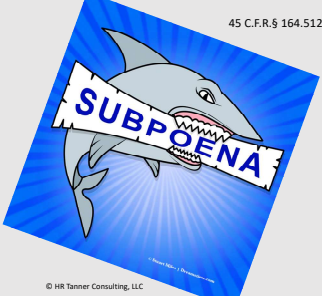
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In the course of a *Judicial and Administrative Proceedings*

45 C.F.R. § 164.512(e)



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42

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SUBPOENA

To (name) _____
of (address) _____ State: _____ Postcode: _____

YOU ARE ORDERED TO: (select one box only)

☒ Attend court to give evidence (see Part A for details of order)

☐ Attend court to give evidence and produce documents (see Part B for details of order)

☐ Produce documents to the Court (see Part C for details of order)

TAKE NOTICE: IF YOU FAIL TO OBEY THIS SUBPOENA
a warrant may issue for your arrest
you may be liable to pay any costs occasioned by
if the matter relates to proceedings under the Family Law Act 1000

Date: _____ Registrar: _____
The last date for service of this subpoena is (See Notes 2, 3 & 4)
Please read Notes 1 to 16 at the end of this subpoena
Filed on behalf of _____
Prepared by _____
Lawyer's code _____
Name of law firm _____
Address for service in Australia _____
State _____
Postcode _____
Email _____

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Disclose only that
information expressly
authorized in the
court order

43

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SUBPOENA

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Postcode _____
Email _____

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If subpoena or
discovery request is
not accompanied by a
separate order?

44

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SUBPOENA

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of (address) _____ State: _____ Postcode: _____

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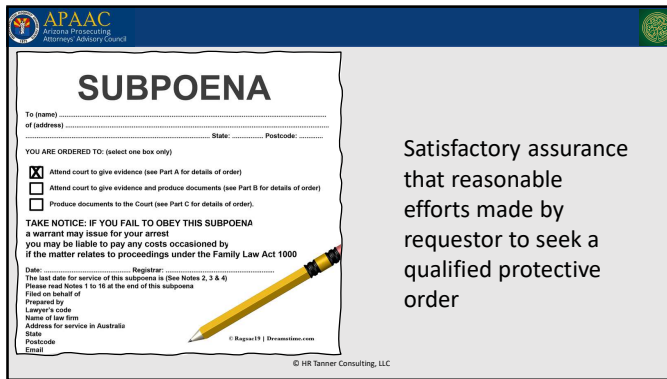
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Prepared by _____
Lawyer's code _____
Name of law firm _____
Address for service in Australia _____
State _____
Postcode _____
Email _____

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Reasonable assurance
that made reasonable
efforts to give notice
to the patient; or

45



SUBPOENA

To (name) _____
of (address) _____ State: _____ Postcode: _____

YOU ARE ORDERED TO: (select one box only)

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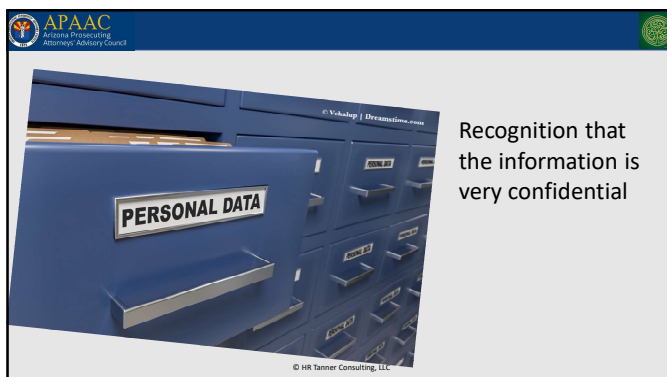
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Satisfactory assurance
that reasonable
efforts made by
requestor to seek a
qualified protective
order

46




47



Recognition that
the information is
very confidential

48

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The protection of a
judicial or quasi-judicial
forum that can restrict
further disclosure

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49

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Arizona Law is Consistent with HIPAA

- “may” disclose records “pursuant to written authorization”
- “shall” disclose records without a written authorization “when ordered by a court or tribunal of competent jurisdiction”
- A subpoena seeking records must be accompanied by a signed authorization or an order that requires the disclosure or a qualified protective order

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Disclosure for Law Enforcement Purposes to a Law Enforcement Official

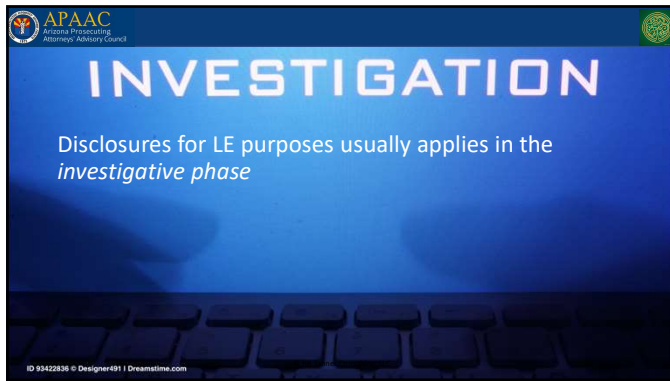
45 C.F.R. §164.512(f)(1)(ii)

In compliance with and limited by a court, search warrant, subpoena or summons by a judicial officer, grand jury subpoena, or administrative request, civil investigative demand, or similar process *provided*

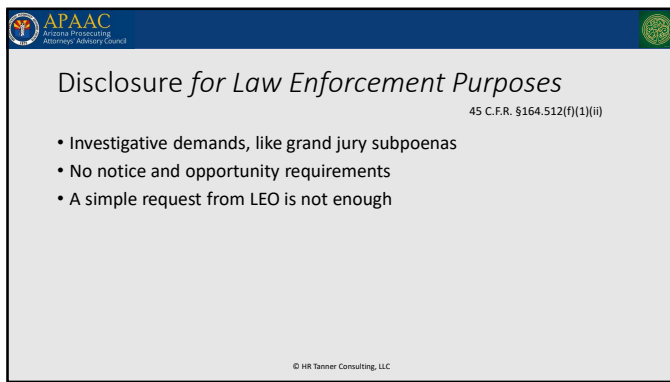
- Information is relevant to legit LE requirement
- Specific and limited in scope
- Can't use deidentified information

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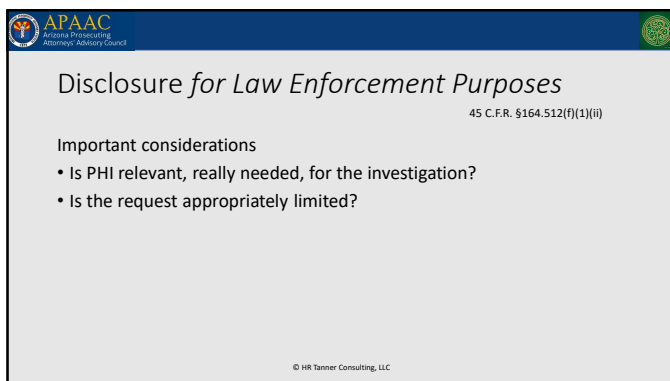
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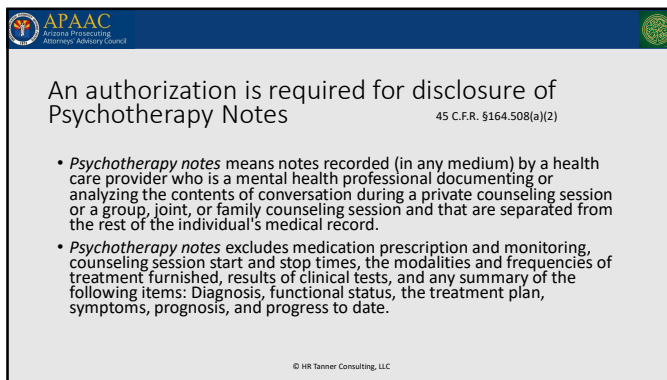
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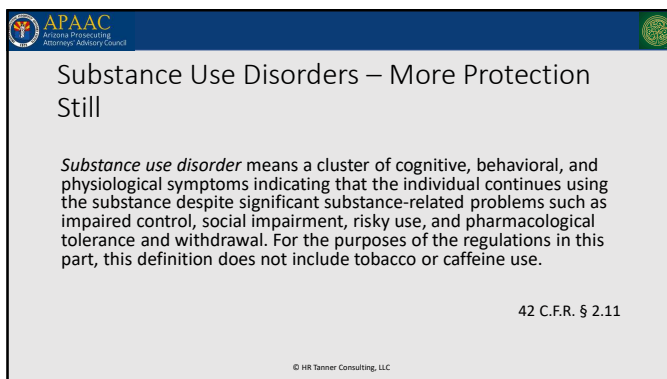
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56



57




Expansive Definition of Records

Records means **any information**, whether recorded or not, **created by, received, or acquired** by a part 2 program relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, **emails, voice mails, and texts**), provided, however, that information conveyed orally by a part 2 program to a non-part 2 provider for treatment purposes with the consent of the patient does not become a record subject to this Part in the possession of the non-part 2 provider merely because that information is reduced to writing by that non-part 2 provider. **Records otherwise transmitted by a part 2 program to a non-part 2 provider retain their characteristic as records in the hands of the non-part 2 provider**, but may be segregated by that provider. For the purpose of the regulations in this part, records include both paper and electronic records.

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58



Why on Earth would the regulations define “undercover agents and informants?”

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General Rule: No Disclosure Without Written Authorization

- Specifically restricts use of information to “initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient” 42 C.F.R. §2.12(a)(2)
- Very few exceptions
 - Communication to LE directly related to patient’s commission of crime on the premises or a threat to commit a crime 42 C.F.R. §2.12(c)(5)
 - Limited to the circumstances of the incident, patient status, name, address and last known whereabouts
 - Reports of suspected child abuse, but limited to report only 42 C.F.R. §2.12(c)(6)

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- Specifically restricts use of information to “initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient” 42 C.F.R. §2.12(a)(2)
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 - Reports of suspected child abuse, but limited to report only 42 C.F.R. §2.12(c)(6)

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The Government is Serious

- Cannot disclose even the presence and status of a person as a patient in a treatment facility that only treats SUDs
- If we ask for it, the response must be made in a way that will not affirmatively reveal that person is or has been diagnosed or treated. The answer will be
 - Getting a copy of the regs
 - Without being told affirmatively that “the regulations restrict the disclosure of the records of an identified patient.”

42 C.F.R. §2.13(c)(2)

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62



The Feds Co-Opt Arizona Law

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Privacy Rules for FVPSA, VOCA, and VAWA Funded Agencies – General Restriction

May not disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected without the *informed, written, reasonably time-limited consent* of the client

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Privacy Rules for FVPSA, VOCA, and VAWA Funded Agencies – Exceptions

Disclosure without the consent of the client is permitted if compelled by “court mandate” – e.g. court ordered subpoena – provided the agency takes reasonable steps to notify the person affected, and necessary steps to protect privacy and safety of the “persons affected” by the release of the information

34 U.S.C § 12291(b)(2)(C)

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65





State Protections in Victim Rights Act

- Advocate disclose any communication made “by or with the victim”, and cannot be forced to testify about any communication, unless written consent is given
- The defendant can move for disclosure of exculpatory evidence
- Court will conduct *in camera* hearing if there is “reasonable cause to believe” material is exculpatory

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Whack-a-Mole

A program, health system, service provider can have information protected from disclosure under multiple laws

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Consider this in Wrapping this Up

Protecting the victim's privacy allows us to *do justice and to be seen as doing justice*

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Consider this in Wrapping this Up


Don't put our partners in the trick bag. They are very concerned about their non-disclosure obligations, and the consequences of violation.

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Consider this in Wrapping this Up


Decide whether privileged information is necessary to the case, because having it may create relevancy fights that deprive the victim of privacy, win or lose

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Consider this in Wrapping this Up

In discovery, the victim has no champion on the field except for us

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72
